

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

~~(Oakland, San Francisco and San Jose Divisions)~~

~~(PROPOSED REVISED - AUGUST 30, 2005 DRAFT)~~

**GUIDELINES FOR CASH COLLATERAL
AND FINANCING MOTIONS AND STIPULATIONS**

A. Introduction

The following Guidelines for Cash Collateral And Financing Motions And Stipulations ("Guidelines") are promulgated pursuant to B.L.R. 9029-1 and apply to uncontested motions or stipulations for the use of cash collateral (see Bankruptcy Code § 363(c)(2) and (3) and Fed. R. Bankr. P. 4001(b) and (d)) and to uncontested motions or stipulations for obtaining credit (see Bankruptcy Code § 364(c) and Fed. R. Bankr. P. 4001(c) and (d)).

B. Introductory Statement

Any motion or stipulation presented to the court for approval must include a completed Cash Collateral - Post Petition Financing Introductory Statement ("Introductory Statement"), which shall not exceed three pages and shall be signed and certified by the Certifying Professional as provided herein.

The Introductory Statement for cash collateral motions and stipulations must summarize all material provisions of the motion or stipulation, including:

- the name of each entity with an interest in the cash collateral;
- the purposes for the use of the cash collateral;
- the terms, including duration, of the use of the cash collateral; and
- any liens, cash payments, or other adequate protection (including any protections afforded by Bankruptcy Code § 364) that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected.

Motions or stipulations for authority to obtain credit under Bankruptcy Code §364, shall be accompanied by:

- a copy of the credit agreement;

- a proposed form of order; and
- the Introductory Statement, which must summarize all material provisions of the proposed credit agreement, including the amount of "new" money to be advanced, interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions.

C. Required Disclosures

If the motion, stipulation, proposed credit agreement or proposed order (either for use of cash collateral or for financing) includes any of the following provisions, the motion or stipulation shall describe the nature and extent of each provision, explain the reasons for each provision, and identify the specific location of the provisions in the proposed form of order, agreement, stipulation or other document:

1. The granting of priority or a lien on property of the estate pursuant to Bankruptcy Code §§ 364(c) or (d);

2. The providing of adequate protection or priority with respect to a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained under Bankruptcy Code § 364 to make cash payments on account of the claim;

3. A determination with respect to the validity, perfection, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing such claim;

4. A waiver or modification of the provisions of the Bankruptcy Code or applicable rules relating to the automatic stay;

5. A waiver or modification of any entity's authority to file a plan, to seek an extension of time in which the debtor has the exclusive right to file a plan, or the right to request the use of cash collateral under Bankruptcy Code § 363(c), or to request authority to obtain credit under Bankruptcy Code § 364;

6. A waiver or modification of the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien;

7. A release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;

8. Indemnification of any entity;

9. A release, waiver, or limitation of any right under Bankruptcy Code § 506(c); or

10. The granting of a lien on any claim or cause of action arising under Bankruptcy Code §§ 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).

11. Provisions for "carve-outs" for professionals' fees and expenses.

~~(NOTE: This item is not in proposed revised Rule 4001)~~

D. Application of Rule 9024

The court may grant appropriate relief under Fed. R. Bankr. P. 9024 if it determines that the Introductory Statement did not adequately disclose a material element of the motion, stipulation or agreement.

E. The court will not ordinarily approve the following:

1. Cross-collateralization clauses, i.e., clauses that secure prepetition debt by postpetition assets in which the secured party would not otherwise have a security interest by virtue of its prepetition security agreement or applicable law. See Bankruptcy Code § 552. Also, "roll-ups", i.e., such as provisions deeming prepetition debt to be post-petition debt or using post-petition loans from a pre-petition secured creditor to pay part or all of that secured creditor's pre-petition debt, other than as provided in Bankruptcy Code § 552(b), which deals with security interests in proceeds and profits. (See ¶¶ C. 1,2)

2. Provisions or findings of fact that bind the estate or all parties in interest with respect to the validity, perfection or amount of the pre-petition secured party's lien or debt. (See ¶ C. 3)

3. Provisions or findings of fact that bind the estate or all parties in interest with respect to the relative priorities of the secured party's lien and liens held by persons who are not party to the stipulation. (This would include, for example, an order approving a stipulation providing that the secured party's lien is a "first priority" lien.) (See ¶ C. 3)

4. Waivers of, or grants of lien on, rights under Bankruptcy Code §506(c), unless the waiver or grant is effective only during the period in which the debtor is authorized to use cash collateral or

borrow funds. (Otherwise a future trustee might be faced with a duty to care for and preserve collateral in the trustee's possession and no financial means for discharging that duty.)(See ¶¶ C. 9, 10)

5. ~~Provisions that operate, as a practical matter, to divest the debtor in possession or trustee of any discretion in the formulation of a plan or administration of the estate or limit access to the court to seek any relief under other applicable provisions of law.~~ (See ¶ C. 5)

6. ~~Releases of~~ or limitations on ~~liability for the creditor's alleged~~ ~~prepetition torts or breaches of contract.~~ (See ¶ C. 7)

7. ~~Waivers of, or liens on any of the estate's rights arising under~~ Bankruptcy Code §§ 544, 545, 547, 548, 549 553, 723(a) ~~and/or~~ 724(a), or the proceeds of any such rights. (See ¶ C. 10)

8. ~~Automatic relief from the automatic stay upon default, conversion~~ to Chapter 7, or appointment of a trustee. (See ¶ C. 4)

9. ~~Waivers~~ and modifications of the procedural requirements for foreclosure mandated under applicable non-bankruptcy law. (See ¶ C. 6)

10. ~~Waivers~~ or limitations, effective on default or expiration, of the debtor in possession's or trustee's right to move for a court order pursuant to Bankruptcy Code § 363(c)(2)(B) ~~authorizing the use of cash collateral in the absence of the secured party's consent.~~ (See ¶ C. 5)

11. ~~Findings of fact on matters extraneous to the approval process.~~ (For example, in connection with an application to borrow on a secured basis, a finding that the debtor cannot obtain unsecured credit would be acceptable if supported by competent evidence, whereas a "finding" that the lender acted in good faith in declaring the prepetition loan in default would not be acceptable.)

12. ~~Provisions providing unreasonable treatment with respect to fees~~ or professionals retained by a creditors' committee compared to any carve-outs provided for professionals retained by the debtor in possession or trustee. (See ¶ C. 11)

13. ~~Provisions that provide an inadequate carve-out for a~~

subsequently appointed trustee in the case, whether before or after conversion. (See ¶ C. 11)

F. The court will ordinarily approve the following:

1. Withdrawal of consent to use cash collateral or termination of f ~~urther~~further financing, upon occurrence of a default or conversion to Chapter 7.
2. Securing any postpetition diminution in the value of the secured party's collateral with a lien on postpetition collateral of the same type as the secured party had prepetition, if such lien is subordinated to the compensation and expense reimbursement (excluding professional fees) allowed to any trustee thereafter appointed in the case.
3. Securing new advances or value diminution with a lien on other assets of the estate, but only if the lien is subordinated to all the expenses of administration (including professional fees) of a superseding Chapter 7 case.
4. Reservations of rights under Bankruptcy Code § 507(b), unless the stipulation calls for modification of the Code's priorities in the event of a conversion to Chapter 7. (See Bankruptcy Code § 726(b))
5. Reasonable reporting requirements.
6. Reasonable budgets and use restrictions.
7. Expiration date for the stipulation.

G. Certification.

Each unopposed motion or stipulation for the use of cash collateral or post petition financing must include a certification signed by counsel for the debtor in possession or trustee ("Certifying Professional") regarding compliance with these Guidelines. The certification must appear as part of the Introductory Statement and be signed by the Certifying Professional. The certification is as follows:

Certification - The undersigned Certifying Professional has read the accompanying motion or stipulation and the Cash Collateral - Post Petition Financing Introductory

Statement; to the best of my knowledge, information and belief, formed after reasonable inquiry, the terms of the relief sought in the motion or stipulation are in conformity with the Court's Guidelines For Cash Collateral And Financing Motions and Stipulations except as set forth above. I understand and have advised the debtor in possession or trustee that the court may grant appropriate relief under Fed. R. Bankr. P. 9024 if the court determines that a material element of the motion or stipulation was not adequately disclosed in the Introductory Statement.

(Certifying Professional's Name)